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IN THE

# Supreme Court of the United States

METRO-GOLDWYN-MAYER STUDIOS INC., ET AL.,
*Petitioners,*

v.

GROKSTER, LTD., ET AL.,
*Respondents.*

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## BRIEF OF AMICI CURIAE INTERNET LAW FACULTY IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICI CURIAE*

*Amici curiae* are teachers of intellectual-property law and Internet law.[1] They are all affiliated with the Berkman Center for Internet & Society at Harvard Law School. They file this brief in support of Respondents because they believe that the outcome of this case will affect in important ways the shape of copyright law, the development and usage of new technologies, and the future of the Internet.

William W. Fisher III is the Hale and Dorr Professor of Intellectual Property Law at Harvard Law School. John G. Palfrey Jr. is the Executive Director of the Berkman Center and a Lecturer on Law at Harvard Law School. Jonathan Zittrain is the Jack N. and Lillian R. Berkman Assistant Professor of Entrepreneurial Legal Studies at Harvard Law School. All file in their personal capacities and not on behalf of the institutions with which they are associated.

## SUMMARY OF ARGUMENT

In *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U.S. 417 (1984), this Court held that the manufacture and distribution of technology that is sometimes used to engage in copyright infringement does not give rise to secondary liability so long as the technology in question is "capable of substantial noninfringing uses." *Id.* at 442. For the purposes of this brief, *amici curiae* assume (a) that the standard articulated in *Sony* governs claims for vicarious infringement as well as claims for contributory infringement;[2] and (b) that

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[1] No counsel for any party contributed to the writing of this brief, and no person or entity other than *amici curiae* made a financial contribution to its preparation. *Amici* are informed that all parties have consented to the submission of this brief and that their letters of consent are on file with the Court.

[2] Support for this interpretation of the Court's ruling in *Sony* may be found in *In re Aimster Copyright Litigation*, 334 F.3d 643, 654 (7th Cir. 2003), but *amici* will not explore the issue in this brief.

the standard was properly applied by the courts below to the facts of this case. The brief is concerned solely with the scope of the "staple-article-of-commerce defense" articulated in *Sony*. Specifically, *amici* contend that the *Sony* standard has proven to be an effective means of balancing the interests of copyright owners with the equally important need to preserve incentives for technological innovation— and thus that the Court should not now modify the standard.

Part I summarizes the enduring merits of the *Sony* test and the hazards of changing it. Parts II and III rebut the argument made by some of the participants in this case that the need to protect the revenues of the entertainment industry requires adoption of a more stringent test. Part II does so by surveying recent technological and marketing innovations in the music and film industries that offer copyright owners promising ways of repairing whatever financial injury they may have sustained—or may in the future sustain—as a result of unlawful uses of "peer-to-peer" file-sharing systems. Part III contends that, if those new business models prove insufficient and, consequently, adjustment of the copyright system is necessary to provide copyright owners both fair returns for their efforts and incentives to engage in creative activity, then modification of the standard for secondary liability would be inferior, for several reasons, to either a streamlined dispute-resolution system, enabling expeditious and inexpensive processing of claims against direct infringers, or a compulsory-licensing regime. Congress is better equipped than the Court to decide if any such reform is necessary and, if so, to select and implement the best of the options.



## ARGUMENT

### I.

### THE *SONY* STANDARD WORKS WELL; THE COURT SHOULD NEITHER CHANGE IT, NOR DEEM IT INAPPLICABLE TO TODAY'S TECHNOLOGIES.

In 1984, this Court was called upon to define the circumstances under which the manufacture and distribution of technology that was used for both infringing and noninfringing purposes would give rise to secondary liability. The line the Court drew was unambiguous:

> The staple article of commerce doctrine must strike a balance between a copyright holder's legitimate demand for effective – not merely symbolic – protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce. Accordingly, the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. *Indeed, it need merely be capable of substantial noninfringing uses.*

*Sony*, 464 U.S. at 442 (emphasis added).

For the past twenty years, that ruling has shielded from copyright infringement suits the developers of many "dual-use" products—devices that are frequently used to violate the copyright laws but also are frequently used for lawful and socially valuable purposes. Three examples:

Personal video recorders (PVRs) consist, essentially, of digital versions of video-cassette recorders (VCRs)—the devices at issue in the *Sony* case itself. Like VCRs, they enable users to record and then replay films and television shows broadcast over the airwaves or through satellite or cable sys-

tems. Unlike VCRs, they enable users conveniently to store large numbers of recordings, and most contain features that enhance the ability of users to "fast-forward" through advertisements. Introduced into the consumer market in 1999, they spread slowly at first, then increasingly rapidly. By the end of 2003, roughly 4.3 million were installed in American households. By the end of 2005, that number is likely to be 17.6 million.[3]

Devices popularly known as "CD burners" enable their users to copy material from computer hard drives or prerecorded compact discs (CDs) onto blank CDs. The first one suitable for personal use was introduced into the American consumer market in 1995 for a retail price of roughly $1,000. Today, versions capable of copying the contents of one CD onto another at fifty-two times playback speed are available for as little as $40. The large majority of personal computers sold in the United States now come with such devices already installed.[4]

Apple Computer's "iPod" is the most popular brand of portable digital music player. Ten million have been sold to date.[5] The biggest model (roughly the size of a pack of cards) holds up to 15,000 audio recordings—equivalent to roughly 750 CDs. Consumers can obtain those recordings in three ways. First, they can purchase individual songs from Apple's iTunes Music Store (of which more will be said in Part II of this brief). Second, they can use software that accompanies each iPod to copy CDs (either their own or their friends') first onto their personal computers and then onto their iPods.[6] Third, they can download recordings in mp3 or

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[3] See Josh Bernoff, Forrester Research, *Will Ad-Skipping Kill Television?* (November 2002).

[4] See William Fisher, *Promises to Keep: Technology, Law, and the Future of Entertainment* 128 (2004).

[5] See, *e.g.*, David Pogue, *Price Tags Get Smaller at Apple*, N.Y. Times, Jan. 13, 2005, at G1.

[6] See *Import as Many Songs as You Like, at* http://www.apple.com/



AAC format onto their computers from the Internet and then transfer them to their iPods. A substantial proportion of the last set is likely obtained through peer-to-peer services like Grokster.

Technologies of these sorts are commonly used in ways that violate the copyright laws. For example, PVRs are commonly used to create permanent or semi-permanent copies of copyrighted motion pictures. In the *Sony* case, this Court held that using a VCR to make a verbatim copy of a motion picture for the purpose of "time-shifting"—i.e., to watch it only once at a time different from the time it was broadcast—was excusable as a "fair use" under 17 U.S.C. § 107 (2005), but strongly implied that making a recording for the purpose of "librarying" would not so qualify. *Sony*, 464 U.S. at 423, 442, 447-56. The implication: many, probably most, purchasers of PVRs are regularly using them to violate the copyright laws.

Similarly, a common use of the CD burners embedded in most personal computers is to make verbatim copies of prerecorded CDs containing copyrighted sound recordings. That practice, it could well be argued, is illegal. Because the burners themselves do not qualify as "digital audio recording devices" under the Audio Home Recording Act, their use is not immunized by 17 U.S.C. § 1008. And because the practice likely corrodes to some degree the normal markets for the prerecorded CDs, it may not qualify as a fair use under 17 U.S.C. § 107.[7]

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itunes/import.html (Feb. 19, 2005) (describing how this practice has been facilitated by the emergence of professional iPod loader services); Jennifer Lee, *Birth of an Industry: iPod Loading*, N.Y. Times, Jan. 23, 2005, Section 10, at 3 (reporting that "for $1 to $1.49 a CD, the professional loaders will embark on the time-consuming process of copying a music collection onto an iPod, often providing a digital backup copy as well.").

[7] For a more detailed exploration of the legal status of CD burners, see Fisher. *supra*, at 128-30. Of course, a finding that the practice of "burning" prerecorded CDs impaired the "potential markets" for copyrighted musi-

For closely related reasons, some of the most common activities enabled and encouraged by iPods and the software with which they are bundled are arguably illegal. The machines themselves do not qualify as "digital audio recording devices"; their use is thus not protected by 17 U.S.C. § 1008.[8] Unauthorized copying onto iPods of copyrighted songs obtained through peer-to-peer services likely violates 17 U.S.C. § 106(1) for the same reason that downloading songs through those services violates 17 U.S.C. § 106(1) in the first instance.[9] And using the iPod software to copy one's own or one's friends' CDs onto one's portable player likely undermines the potential markets for those CDs (and for the same recordings in compressed formats) and thus might not pass muster under the fair-use doctrine.[10]

Yet these devices are also often employed in lawful and socially valuable ways. PVRs, for example, radically increase the flexibility and convenience with which consumers can gain access to broadcast television. (For that reason, Michael Powell, Chairman of the Federal Communications Commission, recently referred to the PVR as "God's machine."[11]) CD burners are often employed to make "backup" copies of data housed on computer hard drives, thus reducing the risk that computer "crashes" will result in catastrophic losses of valuable information. And iPods are used not only to house recordings lawfully purchased through the iTunes Music Store, but also in many legitimate ways unanticipated by their designers. For example, entering students at Duke University are now provided iPods, which they use to download and store coursework, lectures, and administrative information from the university website.[12] Radiologists at UCLA use them to store high-resolution images inexpensively.[13] And a rapidly growing group of amateur and professional broadcasters are now making recorded radio programs available on the Internet, enabling iPod owners to download them and listen to them at their convenience.[14]

Petitioners and some *amici* and commentators urge the Court in this case to modify, in one way or another, the "capable-of-substantial-noninfringing-uses" standard articulated in *Sony*. The Motion Picture and Recording Company Petitioners, for instance, contend that "the staple article of commerce defense should not apply when the primary or principal use of a product or service is infringing." Brief for Motion Picture Studio and Recording Company at 31. Similarly, the Solicitor General argues that secondary liability under *Sony* should be imposed "[i]f the defendant's product

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cal works and sound recordings would not, by itself, necessitate a judgment that it could not pass muster under 17 U.S.C. § 107; other factors would have to be considered as well. But the additional facts (i) that the works being copied are primarily creative rather than factual in character and (ii) that they are being reproduced in their entirety would make a fair-use defense difficult to construct. Cf. *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (explicating and applying the four principal fair-use factors).

8 See *Recording Indus. Ass'n of Am.* v. *Diamond Multimedia Sys. Inc.*, 180 F.3d 1072, 1078 (9th Cir. 1999).

9 See *A&M Records, Inc.* v. *Napster, Inc.*, 114 F.Supp.2d 896, 911 (N.D. Cal. 2000), aff'd, 284 F.3d 1091 (9th Cir. 2002).

10 For one indication of the adverse impact of this practice on CD sales, see Sean Daly, *10 Million iPods, Previewing the CD's End*, Washington Post, Feb. 13, 2005, at A01. Again, other factors would have to be considered as well in order to determine the proper application of the fair-use doctrine. See generally *supra* note 7.

11 See Diane Holloway, *Dawn of a View Era: Digital Video Recorders Are Changing Television Forever*, Austin American-Statesman, July 5, 2003, at Lifestyle Section, http://www.newslibrary.com/sites/aasb/.

12 Mike McGuire, *Free iPods at Duke University Say More About Strategy than Music*, GartnerG2, July 20, 2004, at 1.

13 Jo Best, *Doctors Turn to iPods and Open Source to Cut Costs*, at http://hardware.silicon.com/storage/0,39024649,39127655,00.htm (Feb. 7, 2005).

14 See Chris Baker, *Podcasts Penetrate Radio Market*, Washington Times, Feb. 11, 2005, http://www.washtimes.com/business/20050210-105302-7678r.htm; Kate Zernike, *Tired of TIVO? Beyond Blogs? Podcasts Are Here*, N.Y. Times, February 19, 2005, at A1.

is overwhelmingly used for infringing purposes and the viability of the defendant's business depends on the revenue and consumer interest generated by such infringement...." Brief for the United States as Amicus Curiae at 5. Where the infringing activities are less prevalent, the Solicitor General urges the Court to look to other factors, including how the product is marketed, its efficiency for performing noninfringing uses, and the steps taken by the defendant to eliminate infringement. *Id.* at 6.[15] In a recent article, Professors Lichtman and Landes take a somewhat different tack, contending that secondary liability should be imposed whenever a defendant could "eliminate or greatly reduce the level of infringement without significantly cutting down on the quantity and quality of lawful uses."[16] *Amici* Kenneth Arrow, et al., go further, urging the Court to reformulate the standard established in *Sony* to require lower courts to engage in ad-hoc evaluations of all economic variables implicated by claims of secondary liability. Brief of Amici Curiae Kenneth J. Arrow, et al., at 7–8.

Had one or another of these proposed standards been in force during the past twenty years, the manufacturers of many of the devices sketched above would likely have confronted legal challenges. For example, copyright owners disadvantaged by the deployment of PVR technology would likely have pointed out that such devices could easily be programmed to delete each video recording after it has been watched once all the way through—thus enabling it to be used for time-shifting but not librarying, thereby eliminating

[15] See also Brief of Amici Curiae The Progress and Freedom Foundation at 10-16 (proposing to impose liability not on technologies but on those businesses that deliberately structure themselves to be dependent on infringement); Brief Amicus Curiae of Americans for Tax Reform at 10 (urging the outlawing of business models that "seek to profit from inducing the theft of personal property").

[16] Douglas Lichtman & William Landes, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 Harv. J.L. & Tech. 395, 398 (2003).



its unlawful uses while preserving its value for lawful purposes. Even more precise adjustments to the relevant technology can readily be imagined. For example, TiVo, the most popular of the PVRs, incorporates a system under which each machine typically communicates daily with a central server, ascertaining the times and channels on which particular programs are scheduled for broadcast, thereby enabling consumers more easily to identify the programs they wish to record. At low cost, the operators of the TiVo system could separate the set of programs scheduled for broadcast into two groups—those whose copyrights are owned by parties who object to librarying and those whose copyrights are owned by parties who do not object to librarying—and then instruct the TiVo machines to permit permanent storage of the latter but not the former. Under the standard proposed by Professors Lichtman and Landes, the failure to incorporate such obvious and inexpensive features would seem to make the manufacture and distribution of the device (and its accompanying service) actionable.

CD burners would have been vulnerable to attack from a different angle. Their principal legitimate function—namely, making data "backups"—could easily be performed inexpensively by devices that employ storage media other than CDs, which have the distinct disadvantage, from the standpoint of copyright owners, of being usable in standard music CD players to play sound recordings.[17] *Amici* Kenneth Arrow, et al., contend that "possible legitimate uses of a technology should be evaluated in light of plausible alternative means by which to accomplish the same ends." Brief at 12. In other words, if a lawful use of a particular device could easily be accomplished using some other procedure or technology, then that use should count for little when determin-

[17] Alternatives include external hard drives, ZIP disks, DVDs, USB flash memory drives, and CompactFlash cards. See Christopher Null, *Mega Storage to Go*, PC World Magazine, August, 2003, http://www.pcworld.com/reviews/article/0,aid,111110,00.asp.

ing whether the manufacturer of the device should be liable for contributory infringement. On this theory, the legal status of CD burners would be questionable.

Under the standard advocated by the Solicitor General, the status of iPods would be contestable. Each iPod currently contains an average of 25 recordings purchased through the iTunes Music Store.[18] The bulk of the enormous storage capacity of these devices is thus likely occupied by recordings obtained in ways that, for the reasons sketched above, might be deemed to violate 17 U.S.C. § 106(1). Moreover, Apple emphasizes those problematic techniques when advertising iPods,[19] and the commercial success of the devices likely depends to a substantial degree on consumers' awareness of them.

In short, many socially valuable technologies, built and deployed in reliance on the standard this Court articulated in *Sony*, would be vulnerable to challenge under the modified standards urged by Petitioners and their supporters. Would all of them in the end be deemed infringing? Probably not, but some would. And a finding of infringement would result in the imposition of statutory damages that, in view of the scale of the direct infringement such technologies are alleged to facilitate, would likely bankrupt the com-

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[18] A total of roughly 250 million recordings have been sold through the system, see *iTunes Hits 250 Million Downloads*, news.com, Jan. 24, 2005, *at* http://news.com.com/iTunes+hits+250+million+downloads/2110-1027_3-5547939.html, while roughly 10 million iPods have been sold. See Pogue, *supra*.

[19] See, *e.g.*, Press Release, Apple, *Apple Presents iPod*, *at* http://www.apple.com/pr/library/2001/oct/23ipod.html (October 23, 2001) ("'With iPod, Apple has invented a whole new category of digital music player that lets you put your entire music collection in your pocket and listen to it wherever you go,' said Steve Jobs, Apple's CEO," and "iPod's revolutionary Auto-Sync feature makes it easy to get your entire music collection into iPod and update it whenever you connect iPod to your Mac.").



panies in question.[20]

Even more serious than the impact of such a change on existing enterprises would be its chilling effect on technological innovation in the future. The prospect of prolonged, ad-hoc, fact-specific litigation through which arguments of the sort sketched above would be tested—litigation that, if successful, would result in statutory damages far in excess of the actual resultant injury to copyright owners—would discourage many potential innovators and investors, causing them to abandon ventures that would have redounded to the benefit of society at large.

Large, established manufacturers of consumer electronic equipment might be able to respond to this threat by offering copyright owners positions at their design tables. The drawback of that response is that the copyright owners would likely use their new-found leverage to insist upon the inclusion in all electronic devices of features that would protect their existing business models but would prevent or delay the development of new, more efficient distribution systems.

The adverse impact of the reforms urged by Petitioners would be even greater with respect to zones of information technology not yet dominated by major firms. The efflorescence of the Internet, in particular, has resulted from the uncoordinated inventive activities of thousands of persons and entities, many of them driven more by the love of creativity than the desire to make a profit. From their efforts have emerged many recursively generative technologies—open-ended platforms that enable further waves of innovation. In part because of their open-ended character, some have seemed pernicious when they first appeared, supporting more malign than benign uses. But often, like the iPod, they have soon been adapted to a variety of socially worthy ac-

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[20] Cf. Fisher, *supra*, at 99-102 (describing the collapse of MP3.com following the imposition of statutory damages).

tivities, unanticipated by the original designers. The net effect has been the rapid emergence of a communications medium that offers us extraordinary social, economic, and political benefits. The adoption of a standard of secondary liability that would force innovators in this space henceforth to obtain the approval of copyright owners before launching new ventures would both constrict and slow the flow of new ideas sharply.

## II.

## THE EMERGENCE OF NEW BUSINESS MODELS FOR DIGITAL DISTRIBUTION MAY ELIMINATE THE NEED TO ADJUST COPYRIGHT LAW TO PROTECT THE REVENUES OF COPYRIGHT OWNERS.

The principal rebuttal to the argument made in the preceding Part is that the current situation in the entertainment industry is dire—that the promiscuous distribution and consumption of copyrighted recordings enabled by new technologies is threatening the foundations of the industry—and consequently that a permissive secondary-liability standard that may have been appropriate for the 1980s must be jettisoned in favor of one better able to meet the threats of the twenty-first century. The Motion Picture and Recording Company Petitioners make this argument clearly: "The staggering success of [peer-to-peer systems] threatens the very foundations of the incentive system on which our intellectual property laws rest." Brief for Motion Picture Studio and Recording Company at 42. A failure to shut them down, it is implied, would be catastrophic.

Before assessing this claim, it is worth recalling that similar predictions were made in the early 1980s with respect to the likely impact of the VCR on the music industry. In 1982, Jack Valenti, President of the Motion Picture Association of America, told a House subcommittee: "The VCR is to the



motion picture industry and the American public what the Boston strangler is to the woman alone."[21] Many similar predictions were made by the film studios and their supporters in the *Sony* litigation.[22] In the end, events took a different course. VCRs, it turned out, could be employed not just to record broadcast programming, but also to play prerecorded tapes rented or purchased from video stores, which in turn purchased those tapes from the studios. The studios quickly began to exploit this new potential market for their products. The graph on the following page traces the growth of the resultant income stream.[23] Today, the studios earn more money from sales and rentals of cassettes tapes—and their successors, DVDs—than they do from theatrical performances.[24]

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[21] *Home Recording of Copyrighted Works: Hearings on H.R. 4783, H.R. 4794 H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 97th Cong. (1983) (statement of Jack Valenti, President, Motion Picture Association of America).

[22] See, *e.g.*, Brief Amicus Curiae of Creators and Distributors of Programs, *Sony*, 464 U.S. 417 (arguing that massive videocopying will erode the movie and television industries and have "a pernicious impact on the creative community"); Brief of The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada ("IATSE"), et al., *Sony*, 464 U.S. 417 (claiming that the "interests of IATSE could be catastrophically affected if Appellants prevail").

[23] The data incorporated in the graph pertaining to the years 1998–2003 were derived from Veronis Suhler Stevenson, *Communications Industry Forecast & Report* (18th & 22nd eds. 2004). The data for 1997 were derived from Veronis Suhler Stevenson, *Communications Industry Forecast & Report* (17th & 21st eds. July 2003). The data for 1986–1996 were derived from Veronis Suhler Stevenson, *Communications Industry Forecast & Report* (13th ed. Nov. 1999). The data for 1980–1985 were derived from Veronis Suhler Stevenson, *Communications Industry Forecast* (7th ed. July 1993).

[24] See Kate Bulkley, *DVDs force the movie business to rewrite its rules*, Financial Times, Jan. 20, 2004, at 8 ("In the US, 2002 revenue from DVD/VHS video sales and rental accounted for 62 per cent of the total domestic income of the major studios, according to consultancy Screen Digest.").

**CONSUMER HOME VIDEO AND THEATER SPENDING**
1980 to 2003, $ millions

Something similar appears already to be happening with respect to online distribution of audio and video recordings. To some extent, the increasingly common practice of distributing compressed versions of digital audio and video recordings over the Internet has probably reduced the incomes that copyright owners in the music and film industries otherwise could have earned. (We say "probably," because the economists who have studied the matter continue to disagree over how large a net injury, if any, copyright owners have sustained to date[25] and because the revenues generated

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[25] Kai-Lung Hui & Ivan Png, *Piracy and the Legitimate Demand for Recorded Music*, Contributions to Economic Analysis, Vol. 2, No. 1, Art. 11 (2003); Stan J. Liebowitz, *Pitfalls in Measuring the Impact of File-sharing* 35-59, *at* http://www.utdallas.edu/~liebowit/intprop/pitfalls.pdf (last visited Feb. 22, 2005) (criticizing Oberholzer and Strumpf); Stan J. Liebowitz, *Will MP3 Downloads Annihilate the Record Industry? The Evidence So Far, at* http://ssrn.com/abstract=414162 (June 2003) (arguing file sharing has caused a decline in music sales); Felix Oberholzer & Koleman Strumpf, *The Effect of File Sharing on Record Sales; An Empirical Analysis, at* http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf (March 2004) (concluding file sharing has had no statistically significant impact on music sales); Rafael Rob & Joel Waldfogel, National Bureau of Economic Research, NBER Working Paper No. 10874, *Piracy on the High C's: Music*



by all of the traditional business models in the entertainment industry were higher in 2004 than in 2003.[26]) However, a rapidly growing set of companies have identified ways in which the same technology can be used to create new business models that provide consumers recordings more quickly, conveniently, and cheaply—and, at the same time, fairly compensate creators.

The best known of these new business models consist of online digital-media "stores" and subscription services, such as Apple Computer's iTunes music store and Napster 2.0. Though still in their infancy, these systems have grown extremely rapidly. For example, the iTunes music store, established only in 2003, now boasts a catalog of over one million songs—more than twice the number it offered last year.[27] New similar services spring up constantly. In the past year and a half, over a dozen online music services have opened in the United States; in the past year alone, the number of services available in the world as a whole has quadrupled to 230.[28]

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*Downloading, Sales Displacement, and Social Welfare in a Sample of College Students*, (November 2004), *at* http://papers.nber.org/papers/W10874.

[26] See Associated Press, *Box Office Receipts Soar to Record in '04*, ABC News, Jan. 3, 2005, http://abcnews.go.com/Entertainment/wireStory?id=381006; Mike Snider, *Record Year for DVDs*, USA Today, Jan. 5, 2005, http://www.usatoday.com/life/movies/news/2005-01-05-dvd-main_x.htm; *US Sees Growth in CD Sales Market*, BBC News, Jan. 6, 2005, http://news.bbc.co.uk/2/hi/entertainment/4150747.stm.

[27] Compare, Press Release, Apple, *iTunes Music Store Downloads Top 25 Million Songs, at* http://www.apple.com/pr/library/2003/dec/15itunes.html (Dec. 15, 2003) ("iTunes Music Store offers ... more than 400,000 songs"), with Press Release, Apple, *iTunes Music Store Downloads Tops 200 Million Songs, at* http://www.apple.com/pr/library/2004/dec/16itunes.html (Dec. 16, 2004) ("The iTunes Music Store features more than one million songs").

[28] Int'l Fed'n of the Phonographic Indus. ("IFPI"), *Digital Music Report 2005* 4, *at* http://www.ifpi.org/site-content/library/digital-music-report-2005.pdf (January 19, 2005).

Fierce competition among these enterprises is driving the rapid introduction of new features, which increase their advantages over traditional music distribution systems. [29] For example, most of the online services permit consumers to purchase single tracks in addition to entire albums. Some provide access to their entire catalogs of music in exchange for a flat-fee monthly subscription. This month, Napster 2.0 began offering the first authorized subscription service that allows songs to be moved to portable players.[30] Other recent innovations involve features that help build a sense of community among subscribers or that encourage existing subscribers to recruit new members.[31]

Of most relevance to the current controversy, the monies collected through these alternative channels have been rising fast. In 2004, consumers in the United States used these new systems to purchase roughly $270 million of digital music, nearly three times as much as they did in 2003.[32] Global sales also increased sharply, reaching roughly $330 million in 2004.[33] Most observers expect these numbers to continue

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[29] See generally Derek Slater, Meg Smith, et al., Berkman Publication Series Paper No. 2005-01, *Content and Control: Assessing the Impact of Policy Choices on Potential Online Business Models in the Music and Film Industries*, Jan. 7, 2005, *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=654602.

[30] Jay Lyman, *Napster Goes Mobile with 'To Go' Service*, TechNewsWorld, *at* http://www.technewsworld.com/story/Napster-Goes-Mobile-with-To-Go-Service-40299.html (Feb. 3, 2005).

[31] See, *e.g.*, Bill Rosenblatt, *MusicMatch Introduces Sharing Feature, at* http://www.drmwatch.com/ocr/article.php/3390791 (Aug. 4, 2004); *Discover a Whole World of Music, at* http://www.napster.com/using_napster/all_the_music_you_wantindex.html#discover (last visited Feb. 22, 2005); *Whatcha Listening to?, at* http://www.apple.com/itunes/store/share.html (last visited Feb. 22, 2005).

[32] Jupiter Research, *Market Forecast Report: Music, 2004-2009* 10 (July 22, 2004) (reporting that total market was $99 million in 2003 and projecting growth to $270 million in 2004).

[33] IFPI, *Digital Music Report 2005: Facts and Figures, at* http://www.ifpi.org/site-content/press/20050119b.html. (Jan. 19, 2005)



to rise sharply in the near future.[34]

The existing online market for movies is smaller than the market for music, primarily because digital video recordings, even compressed, are much larger and thus more difficult to distribute (even through broadband connections) and store than audio recordings. Nevertheless, the movie industry is already beginning to experiment with innovative online distribution systems. Movielink allows consumers to rent individual movies. In the past year, CinemaNow and a partnership between Starz! and RealNetworks have both launched online movie subscription services.[35] In light of the enormous size of the DVD market, these models hold extraordinary revenue potential.

Peer-to-peer networks are themselves now giving rise to new business models that provide consumers access to lawful, licensed digital entertainment. The major record labels have announced that they will license their music to such services, like Snocap and Peer Impact,[36] later this year. Many

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(quoting Jupiter Research's prediction of the global $330 million market).

[34] IFPI, *Digital Music Report 2005, supra*, at 3 (arguing that the music "market will grow apace in 2005" and noting Jupiter Research's projection that global music market revenue will double in 2005); *Market Forecast Report: Music, 2004-2009, supra* (predicting that US digital music sales will nearly double in 2005 and will rise to $1.7 billion in 2009); Mike McGuire, *Online Music Industry Sustains Solid Growth in 2004*, GartnerG2, May, 2004, at 5 (predicting that the online music industry will generate more than $1 billion in 2008); Interview with Josh Bernoff, principal analyst at Forrester Research, *Forrester Research's Josh Bernoff Provides Cause for Optimism*, Midem, *at* http://www.midem.com/App/hompage.cfm?moduleid=585&appname=100140&K_MAG_ID=1853&K_MT_ID=75&step=FullStory (Nov. 20, 2003) (Forrester Research predicts US online music market will reach $4 billion in 2008).

[35] See Tim Gnatek, *An Online Supplier for Your Desktop Cineplex*, New York Times, Aug. 12, 2004 at G8 (describing the features offered by these legitimate online movie services); CinemaNow, *Portable Media Center, at* http://www.cinemanow.com/pmc/ (last visited Feb. 20, 2005) (describing portability feature of their online movie service).

[36] See Katie Dean, *P2P Tilts Toward Legitimacy*, wired.com, *at*

independent labels, artists, and producers have already embraced Weed, a service that enables lawful consumer-to-consumer distribution through peer-to-peer exchanges.[37]

More radical business-model experiments employ online peer-to-peer distribution as a promotional tool to spur purchases of content and related goods. For example, the band Wilco believes that releasing a recent album for free online contributed to the subsequent dramatic rise in record sales.[38] Artists who depend heavily on alternative revenue streams, such as live performances and merchandise, have achieved broad distribution and exposure through peer-to-peer networks. Some bands, such as Moe and Donna the Buffalo, have concluded that free peer-to-peer distribution of their recordings has a net positive impact on their revenues by increasing their fans and driving new sources of profit.[39] Related digital efforts, such as Wilco's recent decision to offer the first-ever MPEG-4 live webcast through peer-to-peer networks,[40] further create loyalty between artists and their audience and drive revenue through ancillary sales to the artists and, where relevant, their distributors.

In short, the music and movie industries are adapting to the increased availability and popularity of Internet-based

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http://www.wired.com/news/digiwood/0,1412,65836,00.html (Nov. 24, 2004).

[37] See Katie Dean, *File Sharing Growing Like a Weed*, wired.com, *at* http://www.wired.com/news/digiwood/0,1412,65774,00.html (Nov. 22, 2004); Weed, *Music Producers Hail SML's Weed Distribution Service*, *at* http://weedshare.com/web/releases/12-11-03_WEED_RELEASE.html (Dec. 11, 2003).

[38] Brian Mansfield, *When Free Is Profitable*, USA Today, May 20, 2004, at 1E, *at* http://www.usatoday.com/tech/webguide/music/2004-05-20-file-sharing-main_x.htm; Interview with Jeff Tweedy, Wilco front man, Wired News, *Music is Not a Loaf of Bread*, *at* http://www.wired.com/news/culture/0,1284,65688,00.html (Nov. 15, 2004).

[39] Mansfield, *supra*.

[40] Lawrence Lessig, *Why Wilco Is the Future of Music*, wired.com, *at* http://www.wired.com/wired/archive/13.02/view.html (Feb. 2005).



distribution technologies, just as the movie industry adapted previously to the development of the VCR. In both cases, the adaptations have benefited consumers as well as creators.

Petitioners, while praising the new models, are less sanguine concerning their potential to generate sizeable amounts of revenue for copyright owners. iTunes, Napster 2.0, and their like, they argue, will not be able to compete effectively with "free" services like Grokster and Streamcast. Brief at 41. But, in fact, the new models already seem to be competing quite well. In part, their success seems to derive from increased awareness on the part of the public that downloading music through the unauthorized services is illegal.[41] Many consumers, it appears, once aware of the law, strive to abide by it. Those who are less naturally law-abiding may have been affected by the increased pace of the lawsuits brought by the recording industry against individual uploaders.[42] Last but not least, many consumers are at-

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[41] *IFPI Digital Music Report 2005*, *supra*, at 22 ("Seven out of ten people surveyed in North America and Europe are now aware that unauthorized file-sharing is illegal. Before the recording industry began its public education initiatives and anti-piracy actions against unauthorized file-sharing, this figure stood at only 37%."); Press Release, RIAA, *Recording Industry Begins Suing P2P File Sharers*, *at* http://www.riaa.com/news/newsletter/090803.asp (Sept. 8, 2003) ("Since the recording industry stepped up the enforcement phase of its education program, public awareness that it is illegal to make copyrighted music available online for others to download has risen sharply in recent months. According to a recent survey by Peter D. Hart Research Associates, fully 61% of those polled in August [2003] admitted they knew such behavior was against the law—up from 54 percent in July and 37 percent in early June [2003], prior to the announcement."); Pew Internet Project and Comscore Media Metrix, *The State of Music Downloading and File-sharing Online*, 5, *at* http://www.pewinternet.org/pdfs/PIP_Filesharing_April_04.pdf (April 2004) (In the February 2004 survey, 37% care whether files they download are copyrighted, up from 27% in the March-May 2003 survey).

[42] The RIAA has filed at least 7669 lawsuits since September 2003. John Borland, *RIAA Sues 717 File-swappers*, news.com, *at* http://news.com.com/RIAA+sues+717+file-swappers/2110-1027_3-

tracted by the quality, convenience, and low cost of the services provided by iTunes and its ilk.

In sum, the sky is not yet falling. Instead, we seem to be witnessing today a transition in the entertainment industry as a whole analogous to the transition we saw twenty years ago in the film industry: a new technology is disrupting existing business models, but a new group of intermediaries is identifying ways of harnessing that technology—ways that will leave copyright owners, when the dust settles, better off.

To the foregoing argument, the copyright owners are likely to respond: We are entitled to more than protection against net injury as a result of new technologies. We are entitled, under the copyright statute, to prevent all unauthorized reproductions and distributions of our materials (putting aside, of course, reproductions and distributions shielded by the fair-use doctrine and other defenses). Thus a demonstration that the revenues that they are able to collect from authorized users of a new technology exceed the losses they will sustain as a result of unauthorized uses of the same technology, they will argue, misses the point.

This retort has considerable force in the context of direct infringement. An individual defendant who downloads a copyrighted recording through Grokster or Streamcast cannot plausibly resist an infringement action by pointing to the income that the copyright owner earns from the defendant's neighbor, who obtains the same recording from the iTunes Music Store.

But that the copyright owners are entitled to prevail in suits against direct infringers does not mean that the doctrine of secondary liability should be changed so as to reduce to a minimum the levels of direct infringement. As the Court recognized in *Sony*, an optimal and fair secondary-liability standard must balance the value of effectively sup-

5553517.html (Jan. 27, 2005) (reporting 717 additional lawsuits in the second round, thus bringing the total to 7669).



pressing direct infringement against the social value of preserving opportunities for technological innovation. In *Sony*, the Court concluded that that balance was best achieved by exempting from liability the distributors of technologies that are "capable of substantial noninfringing uses." The Court's judgment proved "prescient."[43] Although substantial amounts of infringing conduct was allowed to continue, the movie industry did not collapse, but rather flourished, and both consumers and electronics manufacturers were permitted to exploit fully the advantages of the new technology. For the reasons outlined above, adherence to the *Sony* standard in the present case would likely lead to a similarly attractive outcome.

## III.

## Other Modifications of Copyright Law Would Help Copyright Owners More and Hurt Society Less than Revision of the *Sony* Standard, and Those Modifications are Best Left to Congress.

If the sky were falling, there would be more effective and sensible ways of propping it back up than changing the standards for secondary liability. Already, two possible modifications of copyright law have been proposed, either of which, if adopted, would do more to shield the revenues of the owners of copyrights in musical compositions, sound recordings, and motion pictures from corrosion while simultaneously doing less damage to other important values advanced by the copyright system.

The first of these, advanced by Professors Mark Lemley and Anthony Reese, would create a new, streamlined dispute-resolution system, overseen by administrative-law judges within the Copyright Office, which copyright owners

[43] See *In re Aimster*, 334 F.3d at 649-50.

could employ when pursuing persons who use peer-to-peer systems to engage in direct copyright infringement. To avail himself of such a system, a copyright owner would need to show that a particular person (whose identity had been ascertained through a subpoena directed to an Internet Service Provider) had uploaded a certain number of copyrighted works to a peer-to-peer service within a prescribed period of time and that the owner had "registered claims of copyrights in the works in question." The defendant would be able to opt out of the system (i.e., to force the copyright owner to pursue an ordinary infringement suit in the courts) by "present[ing] plausible legal or factual issues as to the uploader's liability." But if the defendant failed to do so, streamlined procedures, analogous to those used under the Uniform Dispute Resolution Policy to process claims of "cybersquatting," would enable expeditious and inexpensive processing of the claim.[44] Remedies would include damages and "official designation" of the defendant as an infringer (a designation that would have the practical effect, if repeated, of making it difficult for the defendant in the future to obtain Internet access). A streamlined appellate system would foster consistency and ensure that the procedure was not abused. As Professors Lemley and Reese point out, such a system would radically increase deterrence of unlawful uses of peer-to-peer services, while avoiding the side effects of expanding the scope of secondary liability: the suppression of lawful uses of those services; and inhibition of technological innovation.[45]

The second approach has been explored separately by Professors Neil Netanel, Jessica Litman, and William

[44] For a summary of the UDRP, see The Berkman Center for Internet & Society, *UDRP Opinion Guide*, *at* http://cyber.law.harvard.edu/udrp/opinion (January 2002).

[45] For a far more detailed description of the proposed system, see Mark A. Lemley and R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 Stan. L. Rev. 1345, 1410-25 (2004).



Fisher.[46] Their proposals vary somewhat, but each suggests replacing the current unsatisfactory systems for policing the unlawful distribution of audio and video recordings over the Internet with some kind of compulsory licensing regime. One variant of this idea is summarized below:

> The owner of the copyright in an audio or video recording who wished to be compensated when it was used by others would register it with the Copyright Office and would receive, in return, a unique file name, which then would be used to track its distribution, consumption, and modification. The government would raise the money necessary to compensate copyright owners through a tax—most likely, a tax on the devices and services that consumers use to gain access to digital entertainment. Using techniques pioneered by television rating services and performing rights organizations, a government agency would estimate the frequency with which each song and film was listened to or watched. The tax revenues would then be distributed to copyright owners in proportion to the rates with which their registered works were being consumed. Once this alternative regime were in place, copyright law would be reformed to eliminate most of the current prohibitions on the unauthorized reproduction and use of published recorded music and films. The social advantages

[46] *See* Fisher, *supra*, at 199-258; Jessica Litman, *Sharing and Stealing*, 27 Hastings Comm. & Ent. L.J. 1 (2004); Neil W. Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 Harv. J. L. & Tech. 1 (2003); Other reform proposals in the same vein can be found in: Lawrence Lessig, *Free Culture*, 300-04 (2004); Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. Chi. L. Rev. 263, 312-15 (2002); Glynn S. Lunney Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 Va. L. Rev. 813, 851-58, 910-18 (2001).

> of such a system ... would be large: consumer convenience; radical expansion of the set of creators who could earn a livelihood from making their work available directly to the public; reduced transaction costs and associated cost savings; elimination of the economic inefficiency and social harms that result when intellectual products are priced above the costs of replicating them; reversal of the concentration of the entertainment industries; and a boost to consumer creativity caused by the abandonment of encryption.[47]

To be sure, neither a streamlined dispute-resolution system nor a compulsory-licensing system would be perfect. Each would have significant disadvantages, explored at length in the essays cited above. But if appropriately tuned, each would protect the revenues of copyright owners while simultaneously enabling consumers and society at large to enjoy fully the enormous potential benefits of the new technologies. In that respect, either would be superior to the relief sought in this case by Petitioners.

Both reform proposals have two additional, crucial virtues. First, their impact would be limited to the sector of the copyright system that is arguably diseased—namely, the mechanisms for detecting and punishing the unauthorized reproduction and distribution of audio and video recordings over the Internet. A modification of the *Sony* standard, by contrast, would affect in unpredictable but likely pernicious ways the entire body of copyright law, including many sectors that now seem to be functioning well. Second, either of the alternative reform proposals would be prospective in application. Thus, unlike the relief sought by Petitioners, it would not destabilize established businesses that have relied on the *Sony* standard.

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[47] Fisher, *supra*, at 9.



For the reasons outlined in Part II, neither of the proposed reforms may prove necessary. But if protection of the legitimate interests of the copyright owners in fair compensation eventually does necessitate some adjustment in the copyright statute, then Congress is the body best equipped first to determine the optimal strategy and then to implement it in a way that accommodates the interests of all affected parties.

When major technological shifts in the past have created analogous needs for modification of the copyright system, this Court has recognized the hazards of judicial intervention and the advantages of letting Congress make the necessary adjustments.[48] For example, a century ago the Court refused to come to the aid of music publishers disadvantaged by the development of piano rolls, allowing Congress to create a new right over "mechanical copies," tempered by a compulsory license.[49] Similarly, the Court declined to in-

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[48] While *amici* Senators Hatch and Leahy argue that the courts have a vital role in articulating principles of secondary liability and in deciding properly presented cases, Brief Amici Curiae of United States Senator Patrick Leahy and United States Senator Orrin G. Hatch at 4, they also effectively acknowledge the more fundamental point being made here:

> *Amici* recognize, as this Court has, that advances in technology often present new challenges to the established principles of copyright law, and that when such difficulties undermine the fundamental purposes of that law, Congress "has fashioned the new rules that new technology made necessary." Of course, "[s]ound policy, as well as history supports [this Court's] consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology."

*Id.* at 15 (citation omitted) (quoting *Sony*, 464 U.S. at 431).

[49] *White-Smith Music Pub. Co.* v. *Apollo Co.*, 209 U.S. 1, 18 (1908) (noting "it may be true that the use of these perforated rolls, in the absence of statutory protection, enables the manufacturers thereof to enjoy the use of mu-

tervene on behalf of the owners of copyrights in broadcast programs disadvantaged by the unauthorized retransmission of their materials by cable systems, leaving it to Congress to create yet another compulsory licensing system that balanced the interests of the copyright owners against those of the cable systems and consumers.[50]

The Court recently had occasion to reiterate the principle underlying this consistent practice of deference:

> [I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives. See *Stewart* v. *Abend*, 495 U.S. at 230 ("The evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces . . . . It is not our role to alter the delicate balance Congress has labored to achieve."); *Sony*, 464 U.S. at 429 ("It is Congress that has been assigned the task of defining the scope of [rights] that should be granted to authors or to inventors in order to give the public appropriate access to their work product."); *Graham*, 383 U.S. at 6 ("Within the limits of the constitutional grant, the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim.").

*Eldred* v. *Ashcroft*, 537 U.S. 186, 212–13 (2003).

Congress has already made clear its willingness to intervene on behalf of the owners of copyrights in audio and video recordings if their complaints concerning the adverse impact on their revenues of file-sharing prove well founded. In the past few years, a wide variety of ways of reinforcing their legal positions have been proposed and discussed.[51] If the Court refuses to modify the *Sony* doctrine, many more legislative initiatives will undoubtedly be forthcoming. For the same reasons that have prompted the Court to hold back in analogous circumstances in the past, it would be wise in the present case to let the legislative deliberations take their natural course.

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sical compositions for which they pay no value. But such considerations properly address themselves to the legislative and not to the judicial branch of the Government"). In response, in the Copyright Act of 1909, Congress set up the compulsory-licensing system now embodied in 17 U.S.C. § 115 (2005).

[50] See *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, 415 U.S. 394, 414 (1974) (holding that cable TV ("CATV") did not violate performer's copyright because "[t]hese shifts in current business and commercial relationships, while of significance with respect to the organization and growth of the communications industry, simply cannot be controlled by means of litigation based on copyright legislation enacted more than half a century ago, when neither broadcast television nor CATV was yet conceived. Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress."). For a description of Congress' response, see Paul Goldstein, *Copyright: Principles, Law and Practice* (1st ed. 1989), Vol. I, 639-42.

[51] See, *e.g.*, Family Entertainment and Copyright Act of 2005, S. 167, 109th Cong. (2005); Inducing Infringement of Copyrights Act of 2004, S. 2560, 108th Cong. (2004); Cooperative Research and Technology Enhancement (CREATE) Act of 2004, H.R. 2391, 108th Cong. (2004) (as amended by the Senate); Piracy Deterrence and Education Act of 2004, H.R. 4077, 108th Cong. (2004); Protecting Intellectual Rights Against Theft and Expropriation (PIRATE) Act of 2004, S. 2237, 108th Cong. (2004); Artists' Rights and Theft Prevention (ART) Act, S. 1932, 108th Cong. (2003); Enhancing Federal Obscenity Reporting and Copyright Enforcement (ENFORCE) Act of 2003, S. 1933, 108th Cong. (2003); Protecting Children from Peer-to-Peer Pornography Act of 2003, H.R. 2885, 108th Cong. (2003); Author, Consumer and Computer Owner Protection and Security (ACCOPS) Act of 2003, H.R. 2752, Rep. 108th Cong. (2003); H.R. 5211, 107th Cong. (2002); Consumer Broadband and Digital Television Promotion Act, S. 2048, 107th Cong. (2002).

## CONCLUSION

For these reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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